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November 3, 2008

The Honorable Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: In the Matter of Petition for Approval of Nextel South Corp.'s Adoption of the Interconnection Agreement Between Sprint Communications L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina, d/b/a AT&T Southeast
Docket No. 2007-255-C

In the Matter of Petition for Approval of NPCR, Inc. d/b/a Nextel Partners' Adoption of the Interconnection Agreement Between Sprint Communications L.P./ Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina, d/b/a AT&T Southeast
Docket No. 2007-256-C

Dear Mr. Terreni:

Enclosed for filing in the above-referenced matters is AT&T South Carolina's Petition for Rehearing/Reconsideration or, in the Alternative, Clarification.

With regard to the Alternative Petition for Clarification, Order No. 2008-649 does not expressly address the date upon which Nextel's adoption of the Sprint Agreement becomes effective. In other states where the effective date was not expressly addressed in a Commission Order finding that Nextel could adopt the Sprint Agreement, Nextel has taken the position that its adoption of the Sprint Agreement became effective retroactively to the date of its request to adopt that agreement. For the reasons explained in the enclosed Petition, AT&T disagrees and believes that the effective date should be prospective. Given that this issue is likely to arise in South Carolina,¹ AT&T respectfully brings this disagreement to the Commission's attention and

¹ See, e.g., Nextel's Proposed Order, dated May 18, 2008 (requesting that the Commission enter an effective date of May 18, 2007—the same date as Nextel's adoption request).



The Honorable Charles Terreni
November 3, 2008
Page 2

requests, pursuant to S.C. Code Reg. §103-854 and S.C. Code Ann. §58-9-1200, that the Commission issue an order clarifying that the effective date of Nextel's adoption of the Sprint Agreement is prospective and that the adoption shall be deemed effective thirty (30) calendar days after the final party executes the adoption document

By copy of this letter, I am serving all parties of record with a copy of this Petition as indicated on the attached Certificate of Service.

Sincerely,

A handwritten signature in black ink that reads "Patrick W. Turner". The signature is written in a cursive, flowing style.

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
723641

**BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

IN THE MATTER OF PETITION FOR)
APPROVAL OF NEXTEL SOUTH)
CORP.'S ADOPTION OF THE)
INTERCONNECTION AGREEMENT)
BETWEEN SPRINT)
COMMUNICATIONS L.P., SPRINT)
SPECTRUM L.P. D/B/A SPRINT PCS)
AND BELL SOUTH)
TELECOMMUNICATIONS, INC. D/B/A)
AT&T SOUTH CAROLINA D/B/A)
AT&T SOUTHEAST)

Docket No. 2007-255-C

IN THE MATTER OF PETITION FOR)
APPROVAL OF NPCR, INC. D/B/A)
NEXTEL PARTNERS' ADOPTION OF)
THE INTERCONNECTION)
AGREEMENT BETWEEN SPRINT)
COMMUNICATIONS L.P., SPRINT)
SPECTRUM L.P. D/B/A SPRINT PCS)
AND BELL SOUTH)
TELECOMMUNICATIONS, INC. D/B/A)
AT&T SOUTH CAROLINA D/B/A)
AT&T SOUTHEAST)

Docket No. 2007-256-C

**AT&T SOUTH CAROLINA'S PETITION FOR
REHEARING / RECONSIDERATION OR, IN THE ALTERNATIVE,
FOR CLARIFICATION**

As explained below, BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina ("AT&T South Carolina") respectfully requests that the Public Service Commission of South Carolina ("the Commission") reconsider certain aspects of Order No. 2008-649. In the alternative, AT&T South Carolina respectfully requests that the Commission clarify the effective date of Nextel's adoption of the Sprint Agreement.

I. PETITION FOR RECONSIDERATION

Pursuant to S.C. Code Reg. §103-854 and S.C. Code Ann. §58-9-1200, and in order to preserve its rights to appeal and/or cross-appeal the Commission's rulings in this docket, AT&T South Carolina respectfully requests that the Commission rehear and/or reconsider the following aspects of Order No. 2008-649, dated October 22, 2008, that was entered in this docket.

AT&T South Carolina respectfully requests that the Commission rehear and/or reconsider its decision that "approval of Nextel's adoption requests would be appropriate under the Merger Commitment No. 1" ¹ AT&T South Carolina respectfully requests that the Commission rule in this docket as it ruled in the AT&T South Carolina – Sprint arbitration proceedings, by finding that although it may have concurrent jurisdiction with the FCC to enforce the Merger Commitments, it will not do so. ² In the alternative, for all the reasons set forth in its previous submissions in this docket (including without limitation AT&T South Carolina's oral argument and its Proposed Order), AT&T South Carolina respectfully requests the Commission to rule that the Merger Commitments do not allow Nextel to adopt the Sprint Agreement.

Additionally, AT&T South Carolina respectfully requests that the Commission rehear and/or reconsider its decisions that "[p]ursuant to Section 252(i) of the Act . . . the Nextel entities are entitled to adopt the [Sprint] Agreement" and that "[i]n order to refuse Nextel's request to adopt the Sprint ICA, AT&T must prove to the Commission that one

¹ See Order No. 2008-649 at 7. See also *Id.* at 13.

² See Order Ruling on Arbitration, *In Re: Petition of Sprint Communications Co. L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms, and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast*, Order No. 2007-683 in Docket No. 2007-215-C (October 5, 2007).

of the subparts of 47 C.F.R. §51.809(b) applies.”³ Unlike the Sprint parties to the original agreement, Nextel is not providing wireline local exchange services in South Carolina.⁴ Beyond that, Nextel cannot lawfully provide wireline local exchange services in South Carolina because it is not certificated to do so.⁵ The provisions of 47 C.F.R. §51.809(a), therefore, do not obligate AT&T South Carolina to acquiesce to Nextel’s attempted adoption of the Sprint Agreement because Nextel is not seeking to do so “upon the same terms and conditions as those provided in the agreement.” Since the obligations of subsection 51.809(a) are not triggered, AT&T South Carolina is not required to prove that any of subsection 51.809(b)’s exceptions to those obligations apply.⁶ For these and all the other reasons set forth in its previous submissions in this docket (including without limitation AT&T South Carolina’s oral argument and its Proposed Order), AT&T South Carolina respectfully requests that the Commission reconsider decisions to the contrary and rule that Section 252(i) does not permit Nextel to adopt the Sprint Agreement.

II. ALTERNATIVE PETITION FOR CLARIFICATION⁷

Order No. 2008-649 does not expressly address the date upon which Nextel’s adoption of the Sprint Agreement becomes effective. In other states where the effective date was not expressly addressed in a Commission Order finding that Nextel could adopt the Sprint Agreement, Nextel has taken the position that its adoption of the Sprint Agreement became effective retroactively to the date of its request to adopt that agreement. For the reasons explained below, AT&T disagrees and believes that the

³ Order No. 2008-649 at 13.

⁴ Ferguson Direct at 12; Stipulation at p. 2, ¶¶4, 5.

⁵ Ferguson Direct at 13; Stipulation at p. 2, ¶¶4-5.

⁶ See AT&T’s Proposed Order at 7-9.

⁷ If the Commission grants AT&T South Carolina’s Petition for Reconsideration, this Alternative Petition for Clarification is moot.

effective date should be prospective. Given that this issue is likely to arise in South Carolina,⁸ AT&T respectfully brings this disagreement to the Commission's attention and requests, pursuant to S.C. Code Reg. §103-854 and S.C. Code Ann. §58-9-1200, that the Commission issue an order clarifying that the effective date of Nextel's adoption of the Sprint Agreement is prospective and that the adoption shall be deemed effective thirty (30) calendar days after the final party executes the adoption document.⁹

⁸ See, e.g., Nextel's Proposed Order, dated May 18, 2008 (requesting that the Commission enter an effective date of May 18, 2007—the same date as Nextel's adoption request).

⁹ Establishing a prospective effective date is consistent with the decisions of at least two state Commissions that did expressly address the effective date in their Orders finding that Nextel is entitled to adopt the Sprint Agreement. See, e.g. Order dated December 18, 2007, in re: *Notice of Adoption by NPCR, Inc. d/b/a Nextel Partners of the Existing Interconnection Agreement by and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al. dated January 1, 2001*, Case No. 2007-00256 (Ky. Pub. Serv. Comm'n filed June 21, 2007), and Order dated December 18, 2007, in re: *Notice of Adoption by Nextel West Corp. ("Nextel") of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al. dated January 1, 2001*, Case No. 2007-00255 (Ky. Pub. Serv. Comm'n filed June 21, 2007) (in allowing the parties 20 days thereafter to submit executed adoption documents); Order dated July 17, 2008, in re: *Nextel South Corp.'s Notice of Election of the Existing Commun's Co. et al.*, Docket No. 07-00161 (Tn. Reg. Auth. Filed June 21, 2007), and *NPCR, Inc. d/b/a Nextel Partners' Notice of Election of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al.*, Docket No. 07-00162 (Tn. Reg. Auth. Filed June 21, 2007) Consolidated Docket No. 07-00161 (granting an effective date of May 19, 2008, consistent with the date that the Tennessee Regulatory Authority held its regularly scheduled conference during which the panel ruled on the adoptions in these consolidate dockets). To date, the Florida Public Service Commission is the only commission within the southeastern states in which Nextel has filed adoption requests that has entered an effective date retroactive to the date of Nextel's requested adoption. See, Order dated September 10, 2008, in re: *Notice of Adoption by NPCR, Inc. d/b/a Nextel Partners of the Existing Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al. dated January 1, 2001*, Docket No. 070368-TP (Fl. Pub. Serv. Comm'n filed June 8, 2007); *Notice of Adoption by Nextel South Corp and Nextel West Corp., (collectively "Nextel") of the Existing "Interconnection Agreement By and Between BellSouth Telecommun's, Inc. and Sprint Commun's Co. et al. dated January 1, 2001*, Docket No. 070369-TP (Fl. Pub. Serv. Comm'n filed June 8, 2007). For reasons further explained below, AT&T believes that the Florida Commission wrongly decided the matter, and on September 17, 2008, AT&T Florida filed a Motion for Reconsideration on the issue of the effective date

A. AT&T South Carolina's Request for a Prospective Effective Date is Consistent with Federal Law.

Whether negotiated or arbitrated, interconnection agreements “shall be submitted for approval to the State commission.”¹⁰ It follows, therefore, that unless otherwise agreed to by the parties, interconnection agreements and all rates, terms and conditions contained therein, should properly be executed by the parties and filed with the Commission before they go into effect.¹¹ To do otherwise would be to deny the parties’ due process rights to have disputed issues fully resolved prior to allowing the agreement to take effect. There is no valid reason to depart from that sound logic in this case.

Federal law recognizes that even in the context of an adoption, there will be some delay between a carrier’s request to adopt and the implementation of that request. Far from providing for immediate adoptions or retroactively effective adoptions, therefore, the FCC’s rules require the ILEC to make available adopted interconnection agreements “without unreasonable delay.”¹² In this case, any “delay” Nextel may allege was the result of a bona fide dispute. The clear intent of the agreement Nextel sought to adopt

– which motion remains pending before the Florida Public Service Commission. Finally, the Georgia Public Service Commission ordered January 8, 2008 (coinciding with the extension of the underlying Sprint agreement) as the effective date of the Nextel adoption. *See* Order of the Georgia Public Service Commission, dated September 24, 2008, entered in Petition for Approval of NPCR, Inc., d/b/a Nextel Partners’ Adoption of the Interconnection Agreement Between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T Georgia d/b/a AT&T Southeast, Docket No. 25430, at pgs. 4; 6. For the reasons stated herein, AT&T believes this approach is not appropriate and may be the subject of an appeal..

¹⁰ 47 U.S.C. §252(e)(1).

¹¹ Even when parties to an interconnection agreement have *agreed* to an effective date, an interconnection agreement still cannot lawfully take effect until the Commission approves the interconnection agreement under § 252(e) of the 1996 Act. *See, e.g., Order No. 4, Complaint of AccuTel of Texas, Inc.*, Docket No. 26581, at 3, 5 (Pub. Utils. Comm’n of Texas, Dec. 13, 2002) (holding that, even if parties agree to an effective date, interconnection agreements cannot become effective before commission approval).

¹² 47 C.R.F. § 51.809(a)(emphasis added).

was that it would apply only to a situation where both a CLEC and wireless carrier would be parties to the agreement with AT&T South Carolina,¹³ Nextel is not a CLEC, and AT&T South Carolina did not believe Nextel was attempting to adopt the Sprint Agreement “upon the same terms and conditions” as required by federal law. While the Commission ultimately disagreed with AT&T South Carolina’s position, it is clear that a bona fide dispute existed,¹⁴ and it can hardly be said that any “delay” that occurred while that bona fide dispute was being decided by this Commission was “unreasonable.”

Moreover, establishing a prospective effective date in this docket is consistent with the Sixth Circuit’s decision in *BellSouth Telecomm., Inc. v. Southeast Telephone, Inc.*, 462 F.3d 650 (6th Cir. 2006). In that case, the Sixth Circuit held that a CLEC’s right to adopt an interconnection agreement is conditional and dependent on a state commission’s approval, so that the adoption request cannot become final and effective until it is approved. Specifically, the CLEC contended that it “acquired a vested right to adopt [certain provisions in an interconnection agreement] upon filing its notice of intent”¹⁵ The court rejected that contention, reasoning:

Neither § 252(i) of the Act nor the FCC regulations interpreting it create an unconditional opt-in right or “guarantee” that a CLEC’s adoption request will be granted. To the contrary, [the FCC’s rules] contemplate a regime under which ILECs retain the ability to challenge opt-in requests These grounds for challenging a CLEC’s entitlement to opt-in to an existing agreement would be meaningless if, as [the CLEC] and the PSC maintain, [the CLEC’s] adoption request became effective (and binding) at the moment that request was filed [T]he right to adopt the provision of an existing agreement is contingent upon a state commission’s determination that such an adoption is proper under the statute (Section 252(i)) and the governing regulation¹⁶

¹³ See Order No. 2008-649 at 9.

¹⁴ In fact, the Commission found that “we are inclined to be sympathetic to AT&T’s arguments in this case.” Order No. 2008-649 at 9.

¹⁵ 462 F.3d at 658

¹⁶ *Id.* at 658-660.

Accordingly, the Sixth Circuit concluded, the CLEC acquired no vested rights upon the filing of its adoption request. The same reasoning applies in this case, and Nextel is not entitled to the retroactive effective date it seeks.

B. Nextel's Request for a Retroactive Effective Date of May 18, 2007 is Inconsistent with Both Federal Law and the Commission's Rulings in Order No. 2008-649.

Nextel's request for a retroactive effective date of May 18, 2007 is particularly inappropriate under the facts of this docket. First, Nextel was not entitled to adopt the Sprint Agreement as of that date, and it should not be allowed to accomplish now what it could not have accomplished then. Second, a retroactive effective date would be inconsistent with the Commission's ruling that AT&T South Carolina is allowed to begin renegotiating the adopted agreement when it becomes effective.

1. Nextel's proposed retroactive effective date of May 18, 2007 is inconsistent with the FCC's rule requiring adoptions within "a reasonable period of time."

In accordance with federal law, AT&T's obligation to provide an adoption is limited to a "reasonable period of time" after the original contract is approved.¹⁷ When Nextel requested adoption in May 2007, the Sprint Agreement was expired, and AT&T and Sprint were only operating under the terms and conditions of that agreement on a month-to-month basis as they were negotiating a successor agreement. As several state Commissions have determined, a party attempting to adopt an expired agreement cannot

¹⁷ In limiting the period of time during which an interconnection agreement can be adopted, 47 C.F.R. §51.809(c) asserts: "[i]ndividual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under § 252(h) of the Act."

rationality be said to have requested the adoption within a “reasonable period of time” as required by federal law.

The Georgia Commission, for example, has established a bright line test requiring that to be adopted, an agreement must have at least six months remaining before expiration.¹⁸ In its companion Nextel adoption proceedings, the Georgia Commission held Nextel to this rule in rejecting its request for a May 18, 2007 effective date of the adopted Sprint Agreement:

First, in its September 12, 2007 Order on Petitions, the Commission found that the Sprint agreement was not available for adoption unless and until the expiration date of the Sprint agreement was extended by negotiation or arbitration. This conclusion was based on the Commission’s “bright line” test, which establishes that an agreement must have six months or more time remaining before expiration in order for it to be adopted.¹⁹

Likewise, in two cases from other jurisdictions, a CLEC’s request to adopt an interconnection agreement within approximately ten months and seven months, respectively, of each adopted agreement’s termination date was found to be beyond the “reasonable period of time” requirement.²⁰

In the first case, a CLEC requested adoption of an interconnection agreement approved in 1996. The CLEC sought adoption of the agreement in August 1998, when the agreement was by its terms set to expire on July 1, 1999, and the Virginia Commission denied the CLEC’s request to adopt the agreement because of the limited

¹⁸ See Order of the Georgia Public Service Commission, dated September 24, 2008, entered in Petition for Approval of NPCR, Inc., d/b/a Nextel Partners’ Adoption of the Interconnection Agreement Between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T Georgia d/b/a AT&T Southeast, Docket No. 25430, at p. 3. A copy of this Order is attached as Exhibit A to this Petition.

¹⁹ *Id.* at p. 4.

²⁰ See *In Re: Global NAPs South, Inc.*, 15 FCC R’cd 23318 (August 5, 1999) (“Global NAPs One”); *In re: Notice of Global NAPs South, Inc.*, Case No. 8731 (Md. PSC July 15, 1999)(“Global NAPs Two”).

amount of time remaining under it. Dissatisfied with that result, the CLEC petitioned the FCC for an order preempting the Virginia Commission's decision, but the FCC denied that petition.²¹ Similarly, in the second case, the Maryland Commission held that it was unreasonable for the same CLEC to attempt to adopt a three-year interconnection agreement approximately two and a half years into its term.²²

Clearly, Nextel's May 18, 2007 request to adopt an agreement that already had expired was not a timely request. Nextel, therefore, could not have adopted the Sprint Agreement on May 18, 2007. By seeking a retroactive effective date of May 18, 2007, therefore, Nextel inappropriately is seeking to accomplish now what it could not have accomplished then.

2. Nextel's proposed retroactive effective date of May 18, 2007 is inconsistent with the Commission's Rulings in Order No. 2008-649.

Order No. 2008-649 recognizes that "the clear intent of the agreement in question was that it would apply only to a situation where both a CLEC and wireless carrier would be parties to the agreement with AT&T."²³ It also recognizes that the Sprint Agreement contains language allowing for renegotiation if that situation ceased to exist.²⁴ The Order, therefore, allows AT&T South Carolina to renegotiate the terms of the Agreement once the adoption becomes effective.²⁵ In other words, Nextel can adopt the Sprint Agreement, but when it does, AT&T can immediately begin renegotiating the terms of the agreement.

²¹ See *Global NAPs One*.

²² See *Global NAPs Two*.

²³ Order No. 2008-649 at 9.

²⁴ *Id.* at 12-13.

²⁵ *Id.*

Establishing a prospective effective date as requested by AT&T South Carolina implements these provisions of Order No. 2008-649. In contrast, establishing a retroactive effective date as requested by Nextel would thwart these provisions because it would allow Nextel to operate under the adopted agreement for more than seventeen months (and, therefore, pay AT&T South Carolina a reciprocal compensation rate of zero for more than seventeen months rather than paying AT&T South Carolina the rate set forth in the existing AT&T South Carolina-Nextel agreement) before AT&T South Carolina has the opportunity to begin renegotiating the agreement. The Commission, therefore, should establish a prospective effective date as requested by AT&T South Carolina.²⁶

CONCLUSION

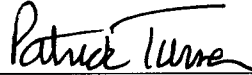
For the foregoing reasons, AT&T South Carolina respectfully requests that the Commission reconsider its rulings in Order No. 2008-649 and determine that Nextel is not entitled to adopt the Sprint Agreement. In the alternative, AT&T South Carolina respectfully requests that the Commission issue an order clarifying that the effective date of Nextel's adoption of the Sprint Agreement is prospective and that the adoption shall be

²⁶ As noted above in footnote 9, the Georgia Commission ruled that Nextel's adoption was effective as of the date the Georgia Commission approved the extension of the underlying Sprint Agreement. AT&T South Carolina anticipates that Nextel may suggest that this Commission take a similar approach and establish an effective date of January 23, 2008 (the date this Commission approved the extension of the underlying Sprint-AT&T Agreement in South Carolina) for the adopted agreement. AT&T acknowledges that a January 23, 2008 effective date would recognize that Nextel's original adoption request was inappropriate and therefore cannot serve as the effective date of the adoption. It is, nonetheless, an inappropriate retroactive effective date that would thwart the rulings in Order No. 2008-649 by allowing Nextel to operate under the adopted agreement for more than eight months before AT&T has the opportunity to begin renegotiating the agreement.

deemed effective thirty (30) calendar days after the final party executes the adoption document.

Respectfully submitted on this the 3rd day of November, 2008.

AT&T SOUTH CAROLINA

A handwritten signature in black ink, appearing to read "Patrick W. Turner", is written over a horizontal line.

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EXHIBIT A

COMMISSIONERS:
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H. DOUG EVERETT
ROBERT B. BAKER, JR.
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STAN WISE



FILED

SEP 24 2008

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DOCKET # 25430
DOCUMENT # 114696

Docket No. 25430

In Re: Petition for Approval of NPCR, Inc., d/b/a Nextel Partners' Adoption of the
Interconnection Agreement between Sprint Communications Company L.P.,
Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications,
Inc. d/b/a AT&T Georgia, d/b/a AT&T Southeast

DOCKET # 25431
DOCUMENT # 114697

Docket No. 25431

In Re: Petition for Approval of Nextel South Corp.'s Adoption of the
Interconnection Agreement between Sprint Communications Company L.P.,
Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications,
Inc. d/b/a AT&T Georgia, d/b/a AT&T Southeast

ORDER ON MOTION TO ENFORCE THE COMMISSION'S MAY 29, 2008 ACTION GRANTING ADOPTION OF INTERCONNECTION AGREEMENTS

Background

On June 21, 2007, NPCR, Inc. d/b/a Nextel Partners filed its Petition for Approval of Adoption of the Interconnection Agreement between Sprint Communications Company L.P., Sprint Spectrum L.P. d/b/a Sprint PCS (jointly, "Sprint") and BellSouth Telecommunications, Inc. d/b/a AT&T Georgia, d/b/a AT&T Southeast ("AT&T"). On the same date, Nextel South Corp. filed an identical petition. (Both Petitions for Approval of Adoption of the Interconnection Agreement between Sprint and AT&T shall be referred to jointly as the "Petitions").

On May 28, 2008, the Georgia Public Service Commission ("Commission") issued its Order Granting Adoption of Interconnection Agreements ("Order Granting Adoption"), which approved the Petitions of NPCR, Inc. d/b/a Nextel Partners and Nextel South Corp. (collectively referred to herein as "Nextel") to adopt the interconnection agreement between Sprint and AT&T (the agreement shall be referred to herein as the "Sprint ICA" or Sprint agreement").

Nextel Motion to Enforce

On July 8, 2008, Nextel filed its Motion to Enforce the Commission's May 29, 2008 Action Granting Adoption of Interconnection Agreements ("Motion to Enforce"). Nextel alleges that AT&T has failed to comply with the Commission's May 20, 2008 Order in this docket by demanding an effective date of May 29, 2008, which coincides with the date of the Commission order. Nextel argues that the effective date should be June 21, 2007, and that that date is consistent with federal law, Commission orders in these dockets, and the Sprint/AT&T Arbitration Docket No. 25064. (Motion to Enforce, p. 2)

Nextel asserts that adopting AT&T's proposed effective date would reward AT&T's attempts to delay resolution of the docket. *Id. at 2*. Nextel notes that the Commission found that AT&T "delayed resolution of these dockets" and that the "delay caused by staggering the presentation of [AT&T's] arguments in opposition to the adoption of the [Sprint ICA] is contrary to the applicable FCC rule." *Id. at 5*. Nextel points to the following language in the Commission's September 12, 2007 Order as evidence that the Commission "necessarily anticipated that an ultimate approval of Nextel's request would be effective as of the date of Nextel's request" *Id. at 6*:

If, at the resolution of the Sprint/ AT&T arbitration, the Commission determines that the parties should extend the contract to December 31, 2007 or beyond, the Commission can approve Nextel's request, once the Sprint contract has been amended.

Nextel also argues that AT&T frequently includes effective dates in its interconnection agreements with other carriers that occur prior to a Commission order approving the agreement. *Id. at 8*.

AT&T Response

AT&T filed its Response to Nextel's Motion to Enforce the Commission's May 20, 2008 Action Granting Adoption of Interconnection Agreements ("Response") on July 18, 2008. AT&T asserts that it is in full compliance with the order, and that, *inter alia*, Nextel's Motion to Enforce is actually a "motion for rehearing, reconsideration, and oral argument," because Nextel is asking the Commission "to reconsider the issue of the effective date and clarify that it is retroactive." Because the Motion to Enforce is a motion for reconsideration, AT&T argues that Nextel failed to comply with Commission Rule 515-2-1-.08 by not filing within the 10 day time limit prescribed in the rule. (Response pp. 1-2)

AT&T asserts that an effective date prior to May 29, 2008 would be improper for several reasons. First, AT&T points to the language in the Commission's May 29, 2008

order that states that the Commission “hereby grants” Nextel’s adoption as proof that the Commission intended the order to apply prospectively. Second, AT&T states that the Sprint agreement expired as of the date of Nextel’s request and, as a result, failed to meet the Commission’s “bright line” test adopted in Docket No. 18808,¹ which established that an agreement must have six months or more time remaining before expiration in order for it to be adopted. AT&T concludes that because the agreement failed the “bright line” test at the time of Nextel’s request, it would be inappropriate to order a retroactive effective date. Third, AT&T argues that the basic rules of contract formation require a meeting of the minds on the terms of agreement and that the Federal Telecommunications Act of 1996 (“Federal Act”) requires state commission approval before the agreement becomes binding. Fourth, AT&T argues that the merger commitment does not contemplate that a ported agreement will become effective as of the date of the request, because ported agreements are subject to various conditions related to state-specific pricing, performance measurement plans, technical feasibility, operational support systems, and network attributes and limitations. Fifth, AT&T states that it did not intentionally delay the proceeding and does not believe it should be punished with an earlier effective date for the length of time involved in resolving the matter. Sixth, AT&T argues that applying an effective date prior to May 29, 2008 constitutes unlawful retroactive rate-making. Finally, AT&T argues that parties are routinely required by the terms of their interconnection agreements to renegotiate a new agreement or term to conform to regulatory changes.

Nextel Reply

Nextel filed its Reply to AT&T’s Response to Nextel’s Motion to Enforce (“Reply”) on July 29, 2008. Nextel states that the Motion to Enforce is not a motion for reconsideration, because the May 29, 2008 order was silent on the effective date. (Reply, p. 2) Nextel takes issue with AT&T’s assertion that it did not intentionally delay resolution of the dispute, and reiterates the arguments regarding delay from its Motion to Enforce. *Id.* at 3-4. Finally, Nextel states that an effective date prior to May 29, 2008 would not constitute retroactive ratemaking, because “[the] Commission’s approval and subsequent enforcement of a carrier’s adoption of an interconnection agreement pursuant to 47 U.S.C. Section(i) has nothing at all to do with “filed rate doctrine”, which mandates that carriers charge and be paid the rates filed in a tariff, or the associated concept of “retroactive ratemaking.”” *Id.* at 4.

Staff Recommendation

The Staff recommended that the Commission find that the appropriate effective date of the adoption by Nextel of the Sprint agreement is January 8, 2008. This date coincides with the Commission’s approval of the Joint Motion to Approve Amendment filed by AT&T and Sprint extending the expiration date of the Sprint agreement.

¹ Petition by Volo Communications of Florida to Adopt the ALLTEL and Level 3 Interconnection Agreement Pursuant to Section 252(i) of the Telecommunications Act of 1996

The Commission's May 29, 2008 Order in these dockets did not address the issue of the appropriate effective date for the adoption. In fact, the issue was not raised in any pleading in this matter,² and the parties were unable to negotiate an effective date subsequent to the May 29, 2008 order. Therefore, Nextel's Motion to Enforce is not comparable to a Motion for Reconsideration, and this issue is properly before the Commission.

Nextel's suggestion that the May 29, 2008 order "anticipated" this dispute and lends credence to the adoption of Nextel's proposed effective date of June 21, 2007 is misguided. First, in its September 12, 2007 Order on Petitions, the Commission found that the Sprint agreement was not available for adoption unless and until the expiration date of the Sprint agreement was extended by negotiation or arbitration. This conclusion was based on the Commission's "bright line" test, which establishes that an agreement must have six months or more time remaining before expiration in order for it to be adopted. At the time of Nextel's request the agreement did not have six months remaining. The agreement was not available for adoption until the Sprint agreement was extended by mutual agreement of the parties. The Commission order approving the Joint Motion to Approve Amendment³ filed by AT&T and Sprint in Docket No. 25064 was issued January 8, 2008.

AT&T is correct that the Commission's "bright line" test prevents the adoption of the Sprint agreement prior to its extension by Sprint and AT&T. Therefore, Staff recommended that the Commission deny Nextel's request to make the agreement effective back to June 21, 2007. However, failing the "bright line" test only indicates that the adoption should not be deemed effective back to the date of the request. It does not foreclose the possibility of any effective date prior to the issuance of the Order Granting Adoption. AT&T does not explain its position that the Order Granting Adoption, by using the words "hereby grants" mandates that the agreement not be made effective at some prior date. The Order Granting Adoption does not address the effective date of the agreement.

AT&T's argument that the Federal Act requires that an interconnection agreement be officially approved by the Commission to become binding is not persuasive. The issue is the effective date that the interconnection agreement should be given, and not the date that the parties are bound to comply with the Commission's order approving the agreement. The Federal Act does not prohibit effective dates prior to approval by the Commission. Next, Staff addressed AT&T's argument that the merger commitment allows it to ensure that agreements comport with the various requirements of the "port to" state. This argument is inapplicable in this situation because the Sprint/AT&T agreement is a Georgia agreement, not a ported agreement. Moreover, Staff's recommendation does

² AT&T states in its Response that it raised the issue of the effective date during the Telecommunications Committee meeting held on May 15, 2008, and that it stated "should the Commission order the adoptions, the effective date could only properly be prospective." (Response, p. 2) However, the Commission did not address the issue of the effective date in its May 29, 2008 order.

³ The amendment extended the Sprint/AT&T interconnection agreement for three years from Sprint's March 20, 2007 request for extension.

not involve the agreement being effective on the date of the request, but instead, Staff recommended an effective date of January 8, 2008, which is months after the request was made.

The Staff next addressed AT&T's contention that it did not intentionally delay the resolution of these dockets. The Commission has already found that AT&T did, in fact, delay resolution. (Order Granting Adoption, pp. 9-10) This conclusion is supported by AT&T staggering the presentation of its objections to Nextel's adoption. *Id.* On July 16, 2007, AT&T filed a Motion to Dismiss along with its Answer to Nextel's proposed adoption. AT&T initially supported Staff's recommendation that the Commission could approve Nextel's request for adoption if the Commission extended the interconnection agreement between Sprint and AT&T. After the Sprint agreement was extended, AT&T filed an Expedited Motion to Modify Telecommunications Committee Schedule and, in the Alternative, for Procedural Schedule, in which it raised arguments that were not included in its previously filed Motion to Dismiss. FCC Rule 51.809(a) obligates incumbent local exchange carriers to make agreements available in their entirety to requesting carriers without unreasonable delay. In this instance, as a matter of fact, the Commission found the delay to be unreasonable.

AT&T's argument that an earlier effective date constitutes retroactive ratemaking is without merit. As a result of AT&T's unreasonable delay, Nextel was not able to finalize the adoption of the Sprint agreement until later than it would have absent this delay. It would not be equitable for Nextel to be harmed as a result of AT&T's unreasonable delay. The Commission's decision is consistent with FCC Rule 51.809(a), and in accordance with its authority under federal and state law to approve agreement adoptions and resolve complaints. Furthermore, AT&T was on notice of the Commission's intent in this case. In its Order on Petitions, the Commission adopted the Staff's recommendation, which provided that "If, at the resolution of the Sprint/ AT&T arbitration, the Commission determines that the parties should extend the contract to December 31, 2007 or beyond, the Commission can approve Nextel's request, once the Sprint contract has been amended." (Order on Petitions, p. 3). AT&T characterized this approach as well-reasoned. Because notice was provided, the action is not retroactive, even though the effective date of the adoption is prior to its approval. *See Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) AT&T's final argument that parties routinely have to negotiate an agreement to conform to regulatory changes overlooks that the cause of the delay in this instance was not negotiations between the parties, but the unreasonable delay resulting from AT&T staggering its objections to the adoption.

In light of these considerations, the Staff recommended that the Commission find that the appropriate effective date of the adoption by Nextel of the Sprint agreement is January 8, 2008. This date coincides with the Commission's approval of the Joint Motion to Approve Amendment filed by AT&T and Sprint extending the expiration date of the Sprint agreement. The Staff found that AT&T did unreasonably delay Nextel's adoption. Staff's recommendation does not adopt either party's position in totality, but

adopts components of each party's recommendation. As a result, Staff's recommended effective date is between the two proposals advanced by AT&T and Nextel.

The Commission finds the Staff's recommendation reasonable. For the reasons set forth therein, the Commission hereby adopts Staff's recommendation.

* * * * *

WHEREFORE, it is

ORDERED, that Nextel's Motion to Enforce is denied to the extent it requests its adoption of the Sprint ICA be deemed effective as of June 21, 2007.

ORDERED FURTHER, that the Commission finds that January 8, 2008 is the appropriate effective date of Nextel's adoption of the Sprint ICA.


ORDERED FURTHER, that a motion for reconsideration, rehearing, oral argument, or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this matter is expressly retained for the purpose of entering such further Order(s) as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 16th day of September, 2008.



Reece McAlister
Executive Secretary



DATE



Chuck Eaton
Chairman



DATE

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for AT&T South Carolina (“AT&T”) and that she has caused AT&T South Carolina’s Petition for Rehearing/Reconsideration or, in the Alternative, Clarification in Docket Nos. 2007-255-C and 2007-256-C to be served upon the following on November 3, 2008.

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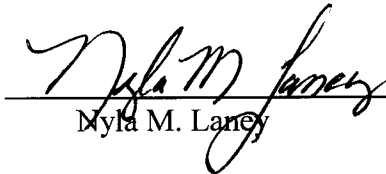
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